Premganesh a/l Dr K Ganaisan v Nagaletchumy a/p Thangarasu & Anor

HIGH COURT (SHAH ALAM) — PETITION NO BA-33–279–05 OF 2021
SM KOMATHY J
14 NOVEMBER 2022

Family Law — Divorce — Adultery — Husband petitioned for divorce on ground his marriage to wife had irretrievably broken down as they had lived apart for two years before petition was presented — Wife counter-petitioned for divorce on ground of adultery and cited the alleged adulteress ('LSM') as party to her petition — LSM applied to strike herself out from the proceedings as no relief was claimed against her — Whether it was frivolous and waste of court's time to inquire into adultery allegation when no relief was sought against LSM — Whether fact that marriage had irretrievably broken down on ground of separation was sufficient for divorce decree to be granted without requiring adultery allegation to be inquired into

The petitioner husband ('PH') had petitioned for the dissolution of his marriage to the respondent wife ('RW') on the ground that their marriage had irretrievably broken down as the parties had lived apart for a continuous period of at least two years immediately preceding the presentation of the petition. In her answer and cross-petition, RW, while admitting the irretrievable breakdown of the marriage and the fact that she and her husband had been living apart, sought dissolution of the marriage on the ground of adultery saying that it was PH's adulterous relationship with another woman ('LSM') that caused the marriage to break down. RW obtained leave to cite LSM as a party to the proceedings but did not claim any damages or other relief against her. LSM filed the instant application pursuant to O 18 r 19(1)(a) and O 92 r4 of the Rules of Court 2012 to strike out the claim against her on the ground that an inquiry into the adultery allegation was purposeless when no relief was claimed against her. LSM said the married couple had accepted that their marriage had irretrievably broken down and a divorce decree was liable to be granted on the ground of separation. RW argued that LSM's application should not be allowed as she could amend her pleadings at any time to seek damages against LSM.

Held, allowing LSM's application:

(1) Under the Law Reform (Marriage and Divorce) Act 1976 ('the LRMDA'), the only ground for divorce was the irretrievable breakdown of the marriage. Fault was irrelevant to the grant of divorce. Section 54 of

the LRMDA listed four separate facts, one of which had to be established in order to prove that the marriage had irretrievably broken down. namely, adultery, unreasonable behaviour, desertion or the fact that the parties had lived apart for a continuous period of at least two years immediately before the presentation of the petition (see para 10).

(2) In the instant case, it was not disputed that the parties had lived separate and apart for two years immediately preceding the presentation of the petition and pursuant to s 54 of the LRMDA, PH was likely to obtain a divorce decree on his petition. Adultery would be an issue for trial if RW had claimed damages against LSM. But this was not the case here. To conduct an inquiry into the adultery allegation merely to assuage the hurt feelings of RW would be a waste of time and would run counter to the philosophy of the divorce legislation (see paras 11–12).

(3) Despite being served with LSM's striking out application, RW made no attempt to amend her pleadings to claim damages against LSM. The court therefore had to decide the application as the pleadings stood. The court agreed with LSM that it was frivolous and would unduly delay the divorce proceedings if the adultery allegation was inquired into when no claim for damages had been made against her (see paras 13–14).

[Bahasa Malaysia summary

Suami pempetisyen ('SP') telah membuat petisyen untuk pembubaran perkahwinannya dengan isteri responden ('IR') atas alasan perkahwinan mereka telah retak dan tidak dapat diperbaiki semula kerana kedua-dua telah tinggal berasingan untuk tempoh berterusan sekurang-kurangnya dua tahun sejurus sebelum pengemukaan petisyen tersebut. Dalam jawapan dan petisyen silang beliau, IR, sambil mengakui keretakan perkahwinan yang tidak dapat diperbaiki dan fakta bahawa beliau dan suaminya telah tinggal berasingan, memohon pembubaran perkahwinan tersebut atas alasan perzinaan dengan mengatakan bahawa ianya adalah hubungan perzinaan SP dengan orang wanita lain ('LSM') yang menyebabkan perkahwinan tersebut retak. RW mendapat kebenaran untuk memanggil LSM sebagai pihak dalam prosiding tersebut tetapi tidak menuntut sebarang ganti rugi atau relif lain terhadapnya. LSM memfailkan permohonan semasa menurut A 18 k 19(1)(a) dan A 92 k 4 Kaedah-Kaedah Mahkamah 2012 untuk membatalkan tuntutan terhadapnya atas alasan bahawa siasatan terhadap dakwaan zina adalah tanpa sebarang tujuan apabila tiada pelepasan dituntut terhadapnya. LSM berkata pasangan suami isteri tersebut telah menerima bahawa perkahwinan mereka telah retak tidak dapat diperbaiki dan dekri penceraian harus diberikan atas alasan perpisahan. IR berhujah bahawa permohonan LSM tidak sepatutnya dibenarkan kerana beliau boleh meminda plidingnya pada bila-bila masa untuk menuntut ganti rugi terhadap LSM.

Diputuskan, membenarkan permohonan LSM:

(1) Di bawah Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('AMPUP'), satu-satunya alasan untuk perceraian adalah keretakan perkahwinan yang tidak dapat diperbaiki semula. Kesalahan adalah tidak relevan dengan pemberian perceraian. Seksyen 54 AMPUP menyenaraikan empat fakta berasingan, satu daripadanya perlu dibuktikan untuk membuktikan bahawa perkahwinan tersebut telah retak dan tidak dapat diperbaiki iaitu, perzinaan, kelakuan tidak munasabah, pemisahan atau fakta bahawa pihak-pihak telah tinggal berasingan untuk tempoh berterusan sekurang-kurangnya dua tahun sejurus sebelum pengemukaan petisyen (lihat perenggan 10).

(2) Dalam kes semasa, ianya tidak dipertikaikan bahawa pihak-pihak telah hidup berasingan dan terpisah selama dua tahun sejurus sebelum pengemukaan petisyen dan menurut s 54 AMPUP, PS berkemungkinan mendapat dekri perceraian atas petisyennya. Perzinaan akan menjadi isu untuk dibicarakan jika IR telah menuntut ganti rugi terhadap LSM. Tetapi ianya tidak berlaku di sini. Untuk menjalankan siasatan terhadap dakwaan zina semata-mata untuk meredakan perasaan sakit hati IR akan membuang masa dan akan bertentangan dengan falsafah perundangan perceraian (lihat perenggan 11–12).

(3) Walaupun telah disampaikan dengan permohonan pembatalan LSM, IR tidak cuba meminda plidingnya untuk menuntut ganti rugi terhadap LSM. Oleh itu, mahkamah terpaksa memutuskan permohonan sebagaimana pliding yang ada. Mahkamah bersetuju dengan LSM bahawa ia adalah remeh dan akan menangguhkan prosiding perceraian jika dakwaan perzinaan tersebut disiasat apabila tiada tuntutan ganti rugi dibuat terhadapnya (lihat perenggan 13–14).]

Cases referred to

SS v HJK [1991] MLJU 18, HC (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 s 54
Rules of Court 2012 O 18 r 19(1)(a), O 92 r 4

Shahreena Abu Bakar Sidik (Shahreena Sidik & Partners) for the petitioner wife. Jagdeep Kaur a/p Jagjeet Singh (Jagdeep Kaur & Assoc) for the respondent husband.

SM Komathy J:

INTRODUCTION

[1] This is an application by one Lee Shir Ming ('LSM') to strike out the claim brought against her by the respondent wife in these divorce proceedings. The respondent wife had added LSM as the party cited in the proceedings on

A the ground that the petitioner husband had committed adultery with the latter.

[2] LSM seeks to strike out the claim against her on the basis that as both petitioner husband and respondent wife seek a dissolution of their marriage in their respective pleadings, it is frivolous and waste of time to inquire into the adultery allegation when the respondent wife has elected not to claim for damages or any other relief from her. The application is made pursuant to O 18 r 19(1)(a) and O 92 r 4 of the Rules of Court 2012 ('the ROC').

C THE BACKGROUND

[3] The petitioner husband and respondent wife were married on 10 April 2005, and have two children. In May 2021, the petitioner commenced the present divorce proceedings for the dissolution of his marriage with the respondent wife on the ground that the marriage had broken down irretrievably as the parties had lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.

[4] By her answer and cross-petition, the respondent wife admitted that the marriage had irretrievably broken down and that the parties had been living separate and apart, but alleged that the true cause of the breakdown of the marriage was the adultery committed by the petitioner. She seeks for the dissolution of marriage on the ground of adultery.

[5] The respondent wife subsequently on 11 November 2021, applied and obtained leave to amend her answer and cross-petition to name LSM as the alleged adulteress. The respondent wife did not seek damages or any other relief from LSM in respect of the alleged adultery.

[6] On 5 April 2022, LSM filed the present application to have the claim against her struck out. For the purpose of these proceedings, LSM has filed two and the respondent wife, one affidavit. The respondent wife strenuously objects to the application.

H PARTIES' SUBMISSIONS

[7] LSM contends that as both parties accept that the marriage has irretrievably broken down and a decree of divorce was liable to be passed on the ground of separation, there is no purpose in inquiring into adultery when the respondent wife does not seek any damages.

[8] In response, the respondent wife argues that the claim against LSM should not be struck out as she is entitled to seek a divorce on the ground of adultery. Additionally, she says the answer and cross-petition can be amended

at any time to seek damage from LSM.

WHETHER ADULTERY ALLEGATION NEEDS TO BE INQUIRED AT TRIAL

[9] It is instructive to refer to the observations articulated by Mahadev Shankar in *SS v HJK* [1991] MLJU 18 on the approach that needs to be taken under The Law Reform (Marriage and Divorce) Act 1976. His Lordship said:

> The Law Reform (Marriage and Divorce) Act 1976 was intended to allow the empty legal shell of a marriage, which has irretrievably broker, down, to be dissolved with the minimum bitterness, distress and humiliation. Law officers can, and must, assist in achieving the object of the Legislature by refusing to allow the policy of our divorce law to be subverted by making the courts a battle ground for exchanging mutual recriminations and petty squabbles which only serves to emphasise the obvious fact that the marriage is at an end.
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> In so many of the divorce cases coming before this court it is becoming increasingly obvious that practitioners seem to believe that in order to determine the proper financial adjustment between the spouses, it is necessary to carry out an investigation into responsibility for the breakdown of the marriage. Such an investigation necessarily involves an in-depth exploration of the conduct of the parties. Every little grievance is then dredged out of the barrel of past experience, often luridly articulated with legal help in an affidavit and then used as a basis for cross-examination.
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> I must state here with the strongest possible emphasis that this is quite wrong, and lawyers who encourage this trend, (perhaps out of ignorance of legal policy rather than a morbid preoccupation with the flotsam and jetsam of a broken marriage) are abdicating their responsibilities to the society they are obliged to serve.
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> We have provided for the machinery of conciliation before the parties come to court so that the warring spouses can be encouraged to ventilate their feelings of anger, resentment or disappointment in the privacy of that venue. If reconciliation is not possible, the certificate which follows, merely confirms that a breakdown of the marriage has taken place which the tribunal has not been able to retrieve.
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> Dissolution is ordered on the basis of irretrievable breakdown. So far as the act of dissolution is concerned it is both unnecessary and undesirable to reopen old wounds by going into a painful investigation of the past. Additionally such an exercise in futility is not of any assistance in getting the parties to come to terms with their new situation ...
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> All that is altered. Parliament has decreed: 'If the marriage has broken irretrievably, let there be a divorce'. It carries no stigma, but only sympathy. It is a misfortune which befalls both. No longer is one guilty and the other innocent. No longer are there long contested divorce suits. Nearly every case goes uncontested. The parties come to an agreement, if they can, on the things that matter so much to them. They divide up the furniture. They arrange the custody of the children, the financial provision for the wife, and the future of the matrimonial home. If they cannot agree, the matters are referred to a judge in chambers.

A When the judge comes to decide these questions what place has conduct in it? Parliament still says that the court has to have 'regard to their conduct': see s 5(1) of the 1970 Act. Does this mean that the judge in chambers is to hear their mutual recriminations and go into their petty squabbles for days on end, as he used to do in the old days? Does this mean that, after a marriage has been dissolved, there is to be
B a post mortem to find out what killed it? We do not think so. In most cases both parties are to blame or, as we would prefer to say both parties have contributed to the breakdown.

It has been suggested that there should be a 'discount' or 'reduction' in what the wife is to receive because of her supposed misconduct, guilt or blame (whatever word is
C used). We cannot accept this argument. In the vast majority of cases it is repugnant to the principles underlying the new legislation, and in particular the 1969 Act. There will be many cases in which a wife (although once considered guilty or blameworthy) will have cared for the home and looked after the family for very many years. Is she to be deprived of the benefit otherwise to be accorded to her by
D s 15(1)(f) because she may share responsibility for the breakdown with her husband? ...

The English decision is concerned primarily with the division of the matrimonial assets. However, I regard it as being of great persuasive value on the approach the Malaysian courts should take in dissociating itself from the financial penalties
E sought to be imposed for emotional reasons. Indeed, it should be noted that the regard a Malaysian Court is required to have 'to the degree of responsibility for the breakdown of the marriage' under s 78 of the Act does not occur in s 76 of the Act. In other words this is a factor only in maintenance applications, not in a division of matrimonial assets. Furthermore the crucial factor in maintenance is the *NEED* of
F the party seeking maintenance to be maintained. Under Malaysian law such maintenance will be payable only if the spouse making the claim is incapable of self-support. ('Needs is not a factor requiring consideration under s 76(2) except as regards the minor children.) Under s 77(2) the court's power to order a wife to pay maintenance *CORRESPONDS* to the power to order a husband to pay maintenance to his wife. Section 78 of the Act under which the assessment must be
G made applies equally to both spouses and cuts both ways ... in Malaysia such conduct will become material only to orders for the continued maintenance of one of the spouses by the other.

[10] These observations of Shankar J resonate with this court. Under the
H LRMDA, there is only one ground for divorce ie the irretrievable breakdown of the marriage. Fault is irrelevant to the grant of divorce. There are four separate facts, one of which has to be established in order to prove that the marriage has irretrievably broken down. In this connection, s 54 of the LRMDA reads:

I Proof of breakdown

(1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say:

(a) that the respondent has committed adultery and the petitioner finds

it intolerable to live with the respondent;

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.

(2) In considering whether it would be just and reasonable to make a decree the court shall consider all the circumstances, including the conduct of the parties and how the interests of any child or children of the marriage or of either party may be affected if the marriage is dissolved and it may make a decree nisi subject to such terms and conditions as the court may think fit to attach, but if it should appear to the court that in all the circumstances it would be wrong to dissolve the marriage it shall dismiss the petition.

[11] Reverting to the instant case. The petitioner's ground for divorce is that his marriage to the respondent has irretrievably broken down since they have been both living separate and apart. In my judgment, as it is not in dispute that the petitioner and respondent have lived separate and apart for two years immediately preceding the petition, by reason of s 54 of the LRMDA, the petitioner husband is likely to succeed in obtaining a divorce on his petition.

[12] The question then arises, is it necessary to also inquire into whether the marriage has also irretrievably broken down on the ground of adultery and pronounce a divorce on the respondent wife's petition. There is no gainsaying that adultery would be an issue to be tried at the trial, if the respondent wife has made a claim for damages from LSM. But, this is not the case here. To conduct an inquiry into the adultery allegation merely to assuage the hurt feelings of the respondent would be a waste of time and, in any event would be running counter to the philosophy of the divorce legislation as pointed out by Shankar J.

[13] That brings me now to the respondent wife's argument that it would be premature to strike out the claim against LSM at this stage as she intends at a later date amend her pleadings to seek for damages. The need to amend would have become apparent to the respondent when she was served with the striking out application, and yet nothing was done and she chose to proceed with the hearing of the striking out application. It therefore behoves me to decide the application as the pleadings stand.

[14] I agree with LSM that it would be frivolous and further unduly delay

A the divorce trial, if the adultery allegation is inquired into when there is no claim for damages. For these reasons, I allow LSM's application with costs of RM5,000.

LSM's application allowed.

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Reported by Ashok Kumar

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